

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File Number EB-03-DV-137
Mallard Cablevision, LLC)	
Former Operator of Cable Television System)	
Community Unit No. WY0087)	NAL/Acct. No.200432800002
Physical ID No. 004758)	
Pinedale, Wyoming)	FRN 0009072752

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2005

Released: March 11, 2005

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* ("Order"), we cancel a monetary forfeiture in the amount of \$8,000 proposed against Mallard Cablevision, LLC ("Mallard"), former operator of the above-captioned cable television system in Pinedale, Wyoming, for its apparent willful and repeated operation of a cable system in violation of the cable signal leakage standards as set forth in Sections 76.605(a)(12) and 76.611(a)(1) of the Commission's Rules ("Rules").¹ While we cancel the forfeiture for a demonstrated inability to pay, we admonish Mallard for its willful and repeated violation of Sections 76.605(a)(12) and 76.611(a)(1) of the Commission's Rules.

II. BACKGROUND

2. On June 8, 2003, an agent from the Commission's Denver Office inspected a portion of Mallard's cable system serving Pinedale, Wyoming, to identify leaks and determine compliance with the Commission's basic signal leakage criteria. The agent identified and measured one leak and based on the measurement of this single leak,² the agent calculated the system's Cumulative Leakage Index ("CLI") at a value of 72.7, exceeding the allowable cumulative signal leakage performance criteria of 64.³ Because of this leak, the agent contacted Mallard cable technicians on June 8, 2003, and orally ordered Mallard to cease operation on aeronautical band frequencies or alternatively, reduce the amplitude of all signals on

¹47 C.F.R. §§ 76.605(a)(12), 76.611(a)(1).

²The leak was measured on the frequency 121.2625 MHz, at 4321 microvolts per meter ("µV/m").

³A maximum CLI of 64 is the basic signal leakage performance criteria of Section 76.611(a)(1) of the Rules. Leakage that exceeds this level is deemed to pose a serious threat to air safety communications.

these frequencies until the leaks were repaired and the system complied with the basic signal leakage criteria.⁴ The Denver Office followed the oral order with a written *Order to Cease Operations*, delivered by facsimile on June 9, 2003.⁵ In accordance with the *Order to Cease Operations*, Mallard was required to complete an inspection of the system's cable plant, make the necessary repairs to bring the system into compliance, and submit a report of their findings. On June 10, 2003, Mallard responded to the *Order to Cease Operations* indicating that over eighteen additional signal leaks were reported that exceeded the basic signal leakage criteria.⁶ Two of the leaks measured were of such magnitude that each leak, taken alone, would cause the system to exceed the allowable cumulative signal leakage performance criteria of 64.⁷

3. On May 25, 2004, the Denver Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to Mallard in the amount of \$8,000 for its apparent willful and repeated operation of a cable system in violation of the cable signal leakage standards as set forth in Sections 76.605(a)(12) and 76.611(a)(1) of the Commission's Rules.⁸ Mallard filed a response to the NAL on June 24, 2004.⁹ In its *Response*, Mallard does not contest the facts in the NAL concerning the system's signal leakage issues. Instead, Mallard states that it filed for Chapter 11 bankruptcy protection on May 9, 2003 and obtained confirmation of its Chapter 11 plan of liquidation on February 13, 2004. Mallard states that it has sold substantially all of its assets, including the above-captioned system, which it sold to LB Cable LLC on February 2, 2004. Mallard further states that it "no longer operates an ongoing business and is instead winding down its affairs"¹⁰ Mallard argues that it has no gross revenues from which to judge its ability to pay because the only remaining funds are those resulting from the sale of Mallard's assets, which have been or are in the process of being distributed in accordance with the court-approved "Plan of Liquidation." In addition, Mallard argues that its bankrupt status should serve as grounds for cancellation of the forfeiture, given the fact that Mallard no longer retains control over the cable system cited in the NAL. Further, Mallard argues that it would not be in the public interest for the bankruptcy court to allow payment of the forfeiture out of the bankrupt estate because payment of the forfeiture would diminish the size of the estate and the amount of money available to other creditors who have no connection to the signal leakage violation. Finally, Mallard argues the Commission is barred from making a claim against the estate because "the opportunity for asserting certain post-administrative expenses, those arising after

⁴Mallard was ordered to cease operations on the aeronautical band frequencies or reduce amplitude of all signals on these frequencies so that the power level did not exceed 10^{-4} watts (38.75 dBmV) across a 25 kHz bandwidth in any 160 microsecond period. Once Mallard complied with the oral shut down order for all aeronautical band frequencies on June 8, 2003, the agent identified and measured seven leaks that exceeded the basic signal leakage criteria on a non-aeronautical band frequency of 157.2625 MHz.

⁵See 47 C.F.R. 76.613(c). Mallard complied with the *Order to Cease Operations*.

⁶These leaks ranged from 30 μ V/m to 2900 μ V/m.

⁷According to Mallard, the leaks measured 1670 μ V/m and 2900 μ V/m respectively. It should be noted that one leak at 1584 μ V/m would cause the cable system to fail CLI.

⁸*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200432800002 (Enf. Bur., Western Region, Denver Office, May 25, 2004).

⁹*Response of Mallard Cablevision, LLC*, filed June 24, 2004 ("Response").

¹⁰*Response* at 3.

May 9, 2003, expired on March 31, 2004.”¹¹

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹² Section 1.80 of the Commission’s Rules (“Rules”),¹³ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”). In examining Mallard’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁴

5. Section 76.611(a)(1) of the Rules requires a cable system to limit its CLI to a value at or below 64.¹⁵ Section 76.605(a)(12) of the Rules requires cable operators to limit basic signal leakage in the frequency band from 54 MHz up to and including 216 MHz to 20 µV/m at a distance of 3 meters.¹⁶ On June 8, 2003, Mallard exceeded the limits for both basic signal leakage and cumulative signal leakage at one location on its system in Pinedale, Wyoming, by operating with a CLI value of 72.7. In response to an *Order to Cease Operations*, Mallard conducted a complete inspection of its system and reported to the Commission’s Denver Office that over eighteen additional signal leaks existed that exceeded the basic signal leakage criteria. Mallard does not dispute the facts of the *NAL* and acknowledges that it operated the above-captioned cable system during the time period described in the *NAL*. Instead, Mallard seeks cancellation of the *NAL* based on its bankrupt status and inability to pay.

6. In the past, the Commission has given considerable weight to an entity’s bankrupt status in determining whether rescission of a forfeiture is warranted.¹⁷ However, filing for bankruptcy alone does not preclude the Commission from imposing a forfeiture upon an entity.¹⁸ Of greater significance is whether the entity has provided financial documentation to substantiate its inability to pay for the Bureau’s analysis, and whether the entity retains control over its assets.¹⁹ Upon review of the evidence presented, we find cancellation of the proposed forfeiture is warranted in light of Mallard’s liquidation of assets and termination of operations. While we cancel the proposed forfeiture, we admonish Mallard for its willful and repeated violation of the cable signal leakage standards as set forth in Sections

¹¹Response at 5.

¹²47 U.S.C. § 503(b).

¹³47 C.F.R. § 1.80.

¹⁴47 U.S.C. § 503(b)(2)(D).

¹⁵47 C.F.R. § 76.611(a)(1).

¹⁶47 C.F.R. § 76.605(a)(12).

¹⁷*Interstate Savings, Inc. d/b/a/ ISI telecommunications*, 12 FCC Rcd 2934, 2936 (1997).

¹⁸*Coleman Enterprises, Inc.*, 15 FCC Rcd 24385, 24389 n. 28 (2000).

¹⁹*Adelphia Cable*, 18 FCC Rcd 7652, 7654 (2003).

76.605(a)(12) and 76.611(a)(1) of the Commission's Rules.²⁰

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,²¹ that the proposed forfeiture in the amount of eight thousand dollars (\$8,000) issued to Mallard Cablevision in the May 25, 2004 Notice of Apparent Liability for willful and repeated violations of Sections 76.605(a)(12) and 76.611(a)(1) of the Rules **IS CANCELLED**.

8. **IT IS FURTHER ORDERED** that Mallard Cablevision **IS ADMONISHED** for its willful and repeated violations of Sections 76.605(a)(12) and 76.611(a)(1) of the Rules.

9. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Mallard Cablevision, LLC, 3821 Racquet Club Drive, Suite B, Traverse City, MI 83276 and Eric E. Breisach, Esquire, Fleischman and Walsh, L.L. P., West Point Center, 950 North Tenth Street, Suite 200, Kalamazoo, MI 49009.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon,
Assistant Chief, Enforcement Bureau

²⁰Because we are canceling the forfeiture based on Mallard's inability to pay, we do not reach Mallard's argument alleging that the Commission is time-barred from pursuing a claim against the estate.

²¹47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).